Victorian Government Solicitor's Office

Client Newsletter

High Court cuts down Commonwealth executive power to spend and contract

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The High Court has recently decided that an agreement between the Commonwealth and the Scripture Union of Queensland (**SUQ**) regarding SUQ's provision of the National School Chaplaincy Program, and the payments under that agreement were unconstitutional.

The proceedings were brought by Mr Williams, a parent whose children attend a primary school in Queensland at which SUQ is funded to provide chaplaincy services.

But the decision has far wider effects than chaplains. It is a decision that will affect Commonwealth-State financial relations for years to come.

In short, the Court held that, subject to certain exceptions, the Commonwealth will now need:

- for contracts and expenditure within the heads of Commonwealth legislative power, **statutory authority**; and
- for contracts and expenditure beyond the heads of Commonwealth legislative power, **the agreement of the relevant States to accept a s 96 grant** with the Commonwealth's preferred conditions.

The decision has immediate ramifications for many Commonwealth funding agreements which require legislative fortification to be saved (such agreements are not invalid until a Court declares them but they are at risk of legal challenge).

Summary

The High Court has recently held the Commonwealth could not run its National School Chaplaincy Program relying on its executive power alone, and that legislative backing was required to enter into agreements and spend money to provide chaplains in schools.

However, the decision has consequences far wider than chaplains and will affect Commonwealth-State financial relations for years to come. Commonwealth programs and grants across all areas of Government may need to be quickly restructured if they are to withstand constitutional challenge.

The High Court emphasised that the Commonwealth should be using s 96 of the Constitution to grant money to the States to fund those programs that are not within its heads of power.

The Commonwealth response

However, last week, the Commonwealth Parliament passed the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). This Act attempts to go much further than just validating existing funding agreements. It does not distinguish between programs/grants that are within the boundaries of Commonwealth legislative power and those that are not.

Instead of only validating the former type (and saving the remainder by restructuring their funding to be paid through the States under s 96 of the Constitution), this Act attempts to give the Commonwealth executive free reign to commit to any programs or grants in the future without parliamentary scrutiny, so long as the program or grant comes under a class in the regulations (or is specified in the regulations). Such classes are broadly defined and the Commonwealth executive could easily amend the regulations if a new category needed to be inserted.

Will this Act be effective? The High Court, in this case and in the 2009 tax bonus case *Pape v Federal Commissioner of Taxation*,[1] stressed that the Commonwealth must have a head of legislative power to support its spending. Some of the programs listed in the draft regulations will fall under a head of legislative power. However, others may not and, regardless of this Act, may remain open to a successful legal challenge.

This might include the National Chaplaincy Program. Four of the seven High Court judges did not decide whether the Commonwealth would have had power to pass legislation to support the agreements and expenditure under the Program. Justices Hayne and Kiefel expressly found that it did not. Justice Heydon found that it did.

Below is a summary of the main aspects of the case. We can advise on any specific programs that may be affected by the High Court's decision.

The religious argument

The most publicised aspect of the case prior to the decision was the argument that the Program breached s 116 of the Constitution by requiring a religious test for an office under the Commonwealth. The High Court unanimously dismissed this argument, holding the connection between the chaplain and the Commonwealth was not sufficient to render the chaplaincy an 'office under the Commonwealth'.

Power to spend money and enter contracts

The case turned on the scope of the Commonwealth government's power to spend money and enter into contracts.

This power of the executive is governed by s 61 of the Constitution. In contrast to the Commonwealth's legislative power, the scope of its executive power is ill-defined, merely stating that:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Rejecting the common assumption

Prior to this case, it was assumed that Commonwealth executive power extended to entering into contracts and funding agreements, at least in areas that fell within the Commonwealth's legislative heads of power, even where legislation had not been passed authorising those contracts and agreements. This assumption was expressly rejected by four judges, on the basis of the federal nature of our constitutional system and the importance of parliamentary sovereignty.

The new approach

The majority began by acknowledging the position in *Pape* that, contrary to a long-standing assumption, parliamentary appropriation is not a source of spending power. It now appears that, subject to exceptions, the Commonwealth will need:

- for initiatives within the scope of Commonwealth legislative power, statutory authority to enter into any contracts and or spend public money; and
- for initiatives beyond the scope of Commonwealth legislative power, the agreement of the relevant States to accept a s 96 grant with the Commonwealth's preferred conditions.

The High Court rejected the idea that the Commonwealth could rely on its legal capacity as a person to enter into contracts as providing sufficient power. Legislative support will generally be required, so to expose funding agreements to parliamentary scrutiny.

In this way, the decision is a continuation of *Pape*, where the Court disagreed that the Commonwealth's power to appropriate money was sufficient to support its expenditure of that money on any subject it liked. There, the Court confirmed that a separate source of legislative power was required to justify such expenditure. Here, the Court extended this to also require actual legislation to be passed.

The majority in this case indicated that there will be some exceptions to this requirement for legislation. The judges made clear that this case did not provide an exhaustive list of exceptions, however, the following exceptions can be identified:

- Contracts and payments in respect of 'execution and maintenance' of the Constitution, being:
  - Contracts and payments in respect of prerogative powers afforded to the Crown at common law such as the power to enter a treaty or wage war;
  - Contracts and payments for the administration of departments of State under s 64 of the Constitution. Chief Justice French described this concept as being analogous with the concept of 'the ordinary course of administering a recognised part of the government' as used in the 1934 High Court case concerning the scope of State executive power, *NSW v Bardolph*.[2] Gummow and Bell JJ noted that these functions would vary from time to time, but would include 'the operation of the Parliament, and the servicing of the departments';
  - Possibly, contracts and payments for responses to national emergencies or the need for some unique national enterprise (only Crennan J expressed a view on this).
- Contracts and payments in respect of 'execution and maintenance' of 'the laws of the Commonwealth'. As French CJ noted, 'that field of action does not require express statutory authority, nor is it necessary to find an implied power deriving from the statute'. In other words, a program only needs to have some basis in statute - the statute itself does not need to authorise each and every contract and payment.
- Possibly, contracts and payments for the 'ordinary annual services of government', in the sense of any policies that are not new policies (only Crennan J went so far as to state this as an exception). However, Gummow and Bell JJ suggested that if a program had not been previously authorised by legislation, the fact it had been going for a number of years would not necessarily bring it within the ordinary and well-recognised functions of government.
- Possibly, contracts and payments relating to 'the funding of activities in which the departments engage or consider engagement', a concept suggested by Gummow and Bell JJ but not explained further or explored by the other judges.

The funding agreement for the Chaplaincy Program was held by the majority not to fall within these exceptions and was therefore invalid.

For further information

For further information or legal advice on any issues raised in this newsletter, contact:

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[1] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1

[2] *New South Wales v Bardolph* (1934) 52 CLR 455